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**VIRGINIA BOARD OF MEDICINE
LEGISLATIVE COMMITTEE**

MINUTES

SEPTEMBER 27, 2002

The Legislative Committee chaired by J. Kirkwood Allen met on Friday, September 27, 2002, at 8:30 a.m., at the Department of Health Professions ("DHP"). The meeting was called to order by Mr. Allen.

MEMBERS PRESENT: J. Kirkwood Allen, Chair
Carol E. Comstock, RN
Joseph A. Leming, MD
Sue Ellen B. Rocovich, DO
Clarke Russ, MD
Rev. LaVert Taylor

MEMBERS ABSENT: Robert J. Bettini, MD

STAFF PRESENT: William L. Harp, MD, Executive Director
Karen W. Perrine, Deputy Executive Director of Discipline
Robert Nebiker, Director, DHP
Elaine Yeatts, DHP Senior Regulatory Analyst
Deborah A. Ordiway, Recording Secretary

GUESTS PRESENT: Harry C. Beaver, MD, President of the Virginia Board of Medicine;
Susan Ward, Virginia Hospital and Healthcare Association; Joy Bechtold, VAHP, Jeff Buthe,
Medical Society of Virginia and Cal Whitehead, Virginia Society of Ophthalmology

ADOPTION OF AGENDA

Dr. Russ moved to adopt the agenda. The motion was seconded and carried unanimously.

PUBLIC COMMENT ON AGENDA ITEMS

There was no public comment.

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APPROVAL OF MINUTES OF MAY 17, 2002

Ms. Comstock moved to approve the minutes of the Legislative Committee dated May 17, 2002. The motion was seconded and carried unanimously.

#1 Review of Executive Order 21

A copy of Executive Order 21 was contained in the agenda packet. Executive Order 21 calls for the development and review of regulations proposed by state agencies. Ms. Yeatts stated that under the review process the Notice of Intended Regulatory Action has very specific deadlines established. Within 14 days of receiving a complete NOIRA review package from the agency, the Director of the Department of Planning Budget shall advise the appropriate Secretary and the Governor of Department of Planning and Budget's determination.

Ms. Yeatts announced there is a new Joint Legislative Commission on administrative rules.

#2 Chart on Status of Regulations

Contained in the agenda packet was a copy of the Board of Medicine's regulatory actions

#3 Regulatory Actions

Withdrawal of NOIRA – felony convictions on profile

Ms. Yeatts stated that this Notice of Intent was published as a result of legislation passed in 2001, which mandated that felony convictions be on the practitioner information system, also known as the "profile." In the 2002 session of the General Assembly, Senate Bill 59 was passed which required the board to make a number of changes to the profile. Emergency regulations were adopted, and incorporated into that process was the inclusion of felony convictions.

Dr. Rocovich moved to recommend to the full Board the withdrawal of this Notice of Intended Regulatory Action that was published on April 2002 because it was duplicative. The motion was seconded and carried unanimously.

Adoption of Proposed Regulations for Profile Changes

Ms. Yeatts stated that the proposed regulations implement the requirements of Senate Bill 59, incorporates felony convictions, and modifies the language about reporting paid claims. There was no comment on the Notice of Intended Regulatory Action to amend the regulations.

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Mr. Taylor moved to recommend to the full Board to adopt the proposed regulations. The motion was seconded and carried unanimously.

Adoption of Proposed Regulations on the Practice of Physician Assistants

Ms. Yeatts stated that the proposed regulations include the implementation of 2002 legislation. There were no comments to amend the regulations.

Dr. Russ suggested adding a statement to the regulations that continuous responsibility for patient care remains with the physician. Ms. Yeatts stated that a statement could go in the regulations that the supervising physician remains responsible for the care of the patient.

Mr. Taylor asked if it was possible to add such language to the protocol. Mr. Nebiker suggested adding an attestation statement to the protocol that states that the supervising physician remains responsible for the care of the patient.

Dr. Russ moved to accept the regulations as written and that the protocol be modified to add an attestation that not only do they understand the law and the regulation but also they understand their ultimate responsibility to the patient. Dr. Russ asked the staff to work on the attestation wording. Ms. Yeatts also asked that 18 VAC 85-50-115(B) be changed to delete the word "employing" from the beginning of the second sentence. Dr. Russ accepted this as a modification of his motion. The motion was seconded and carried unanimously.

Adoption of Volunteer Practice

Dr. Rocovich moved to forward to the full Board the addition of volunteer practice to 18 VAC 85-20, 18 VAC 85-40, 18 VAC 85-80, 18 VAC 85-101, 18 VAC 85-110 and 18 VAC 85-120. The motion was seconded and carried unanimously.

Adoption of Final Regulation 18 VAC 90-40 Prescriptive Authority

Ms. Yeatts stated a periodic review of the Regulations Governing Prescriptive Authority for Nurse Practitioners was done. There was no comment on the proposed regulations.

Ms. Comstock moved to forward to the full Board the adoption of final regulation 18 VAC 90-40. The motion was seconded and carried unanimously.

#4 Legislative proposals for 2003 Session of the General Assembly

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Ms. Yeatts stated that all of the packages have been submitted for review by the Secretary of Health and Human Resources and then the Secretary submitted her package to the Governor's office, and we are awaiting word if any of them will be a part of the Governor's packet. Two proposals were submitted. One was a technical change in the physician assistants' law and the second having to do with exemption for licensure for radiologic technologists in hospitals.

#5 Review of the Board's Disciplinary Process

Dr. Harp stated contained in the agenda packet is a copy of the workshop minutes of September 14, 2002. A discussion of the disciplinary process was held at this workshop.

Dr. Beaver stated this issue has been of concern for a period of time. He suggested that a letter of concern might be developed for physicians who have had complaints lodged against them and who are not aware of the nature of the complaint being lodged and subsequently having the case closed administratively with no action taken.

Mr. Nebiker stated that Neal Kauder will be speaking at the next full Board meeting to give his report regarding the sanction reference study. This study may assist the Board with the issue of being able to have some sort of intermediate tool available to deal with some of the cases that do not currently rise to the level of a violation. Mr. Nebiker stated there is an issue of whether there are sufficient resources available to the board to get its job done. There are operational issues such as amending some of the statutes that require reporting to the board. Sometimes the initial report is not received until three or more years after the underlying conduct has occurred relative to the practitioner. There might be legislation to address this issue. Mr. Nebiker stated that out of 65 boards that are members of the Federation of State Medical Boards, 45 boards have the standard of preponderance of evidence.

Dr. Leming stated there are six issues that need to be addressed.

1. How fast a healthcare entity gets a report to this board about the possibility that a licensee is a danger to patients. Hospitals typically do not report anything until every appeal process within their institution provided by their bylaws or corporate documents has been exhausted. He suggested that wording to the effect that any healthcare entity that suspends the privilege of a practitioner shall be reported to the licensing board within 48 hours.

Dr. Leming moved that staff prepare legislation that would strengthen the current statute regarding hospitals and other healthcare institutions obligated to report matters to the Board of Medicine to be presented to the full Board. The motion was seconded and carried unanimously.

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2. The negligence standard may be changed by legislation.

Dr. Leming moved that staff look at the other options that are available between gross and simple negligence and come back with suitable language. Mr. Nebiker suggested that the staff look at statutes that exist for other licensing boards in the Department of Health Professions. Laws of other medical boards should be reviewed, also. The motion was seconded and carried unanimously.

3. Burden of proof.

Ms. Perrine stated that the issue is whether the board would support legislation that would change the standard of proof for the board to find a violation from the clear and convincing standard to a lower evidentiary standard, which is the preponderance of the evidence. Mr. Nebiker stated that some states have dual standards for different outcomes.

Dr. Leming moved that the standard for revocation or suspension be clear and convincing, but for other actions it should be preponderance of evidence. Further, the standard for reinstatement should be clear and convincing. The motion was seconded and carried unanimously.

4. Proposed that this board draft legislation for a nonpublic tool called a private letter of concern in cases of nonpatient care related complaints where a violation was believed to have occurred.

Dr. Leming suggested that the board develop a procedural tool which provides a nonpublic disposition of a complaint where a probable violation of law has been determined to have occurred that does not involve a patient care related issue. Dr. Russ stated he was not in favor of this if it was not a public disposition. Ms. Perrine stated one option for this tool was to specifically categorize it as nondisciplinary action and it is carved out of being considered a sanction or disciplinary action; however, it would be available to the public. Dr. Russ stated this whole category should be classified as an administration action and then it does not rise to a disciplinary action.

Dr. Russ moved that staff present to the board at its October meeting formulation for addressing nondisciplinary administrative matters through letters of concern, agreement and consent or any other formulation to liberate the board to be able to spend more time with disciplinary matters before it. This letter would be available for all types of situations, and would be public. The motion was seconded and carried unanimously.

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5. The Miranda concept should be extended to a licensee of the board upon interview, questioning, investigation, etc., so that a licensee is advised of their administrative right to counsel.

Dr. Leming stated the individuals should be told what the process is and their right to counsel at the time they become the target of the investigation. Ms. Perrine stated that under the Administrative Process Act there is a right to counsel once an administrative proceeding is convened. She did not know of any provision that attaches a right to counsel at the time of the investigation. Ms. Perrine suggested that this issue should not be handled by legislation but from a departmental policy. Mr. Nebiker stated this is an operational issue and he would look into it. The Committee concurred.

6. Implementation an internal policy for reconsideration of IFC decision. A respondent having been heard by an informal conference committee and having been a recipient of an order may submit a motion within 15 days of the receipt of that order demonstrating good cause for reconsideration thereof before that order would ever become final and proceeding to a formal hearing.

Dr. Leming moved that the board develop a policy to support reconsideration of IFC decisions for good cause. The motion failed for lack of a second.

Dr. Leming moved that the board develop a policy that no informal committee decision be reconsidered and every informal conference committee decision that wishes to be altered be referred to a formal hearing. The motion failed for lack of a second.

7. Need to be an independent authority.

Dr. Leming moved that the Attorney General's office study and report to the Board on the option of becoming an independent authority. The motion was seconded and carried unanimously.

8. Increasing the revocation period.

Ms. Comstock moved that the revocation period be up to five years. The motion was seconded and carried unanimously.

#6 Letter from American Electrology Association

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An informational letter from the American Electrology Association was distributed to the board members. This association states that they believe laser treatment to be the purview of medicine.

Dr. Russ moved to adopt a position similar to that of the North Carolina Board of Medicine regarding laser technology by non-health practitioners and that board staff conduct a survey of other states on this issue. The motion was seconded and carried unanimously. North Carolina stated that laser surgery should be performed only by a physician or by a licensed health care practitioner working within his or her professional scope of practice and with appropriate medical training functioning under the supervision, preferably on-site, of a physician or by those categories of practitioners currently licensed by this state to perform surgical services.

#7 FSMB Call for Resolutions

Resolutions for consideration at the Federation's April 12, 2003 House of Delegates annual business meeting in Chicago are requested to be forwarded to the Federation by February 3, 2003.

#8 HJR 122

An informational letter from the Department of Health on the study of methylphenidate and amphetamine prescriptions was distributed.

#9 COTA Licensure

Dr. Leming stated that the Department of Health Professions should not certify or license COTAs, as there has been no harm to the public.

Dr. Leming moved not to certify or license COTAs and that the matter should not be studied. The motion was seconded and carried unanimously.

ADJOURNMENT

With no further business to discuss, the Legislative Committee of the Board of Medicine adjourned.

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J. Kirkwood Allen
Chair

William L. Harp, MD
Executive Director

Deborah A. Ordiway
Recording Secretary